

GLENWOOD MOBILE RADIO CO.

IBLA 87-168

Decided December 7, 1988

Appeal from a decision of the Grand Junction District Office, Bureau of Land Management, rejecting communication site right-of-way application C-43082.

Affirmed.

1. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

Approval of an application for a communication site right-of-way pursuant to sec. 501(a)(5) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(5) (1982), is discretionary with the Department. A decision rejecting a single-user right-of-way application will be affirmed on appeal where it is predicated on the public interest in limiting authorized sites to multi-user facilities and the evidence fails to establish a multi-user site would not adequately serve the applicant's needs.

APPEARANCES: Jon R. Hiebert, president and Don E. Wright, vice-president, for Glenwood Mobile Radio Co.; Glenn F. Tiedt, Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Glenwood Mobile Radio Company (Glenwood Mobile) appeals from a decision of the Grand Junction District Office, Bureau of Land Management (BLM), dated October 30, 1986, rejecting communication site right-of-way application C-43082. ^{1/} On July 8, 1986, Glenwood Mobile had filed the right-of-way application requesting authorization to use an 8- by 8-foot metal shed located on Lookout Mountain, Garfield County, Colorado, NE¼ SW¼

^{1/} The application form recites that it was filed pursuant to the Act of Mar. 4, 1911, 36 Stat. 1253, repealed Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 706(a), 90 Stat. 2793. The authority for issuance of rights-of-way for communication site purposes is now found at Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1982).

sec. 11, T. 6 S., R. 9 W., sixth principal meridian, to house mobile telephone communication systems. Appellant also proposed to add a 50-foot tower to the building to replace the 30-foot tower which had been removed by the previous owner of the shed. Glenwood Mobile had purchased the metal building from Garfield County, which had formerly used the structure and tower pursuant to communication site right-of-way C-23456 also issued by BLM. 2/

On August 20, 1986, Mountaintop Management, Inc. (Mountaintop), filed a protest of Glenwood Mobile's right-of-way application. Mountaintop is a competitor of Glenwood Mobile, and is the owner-operator of a multi-user electronic facility located on Lookout Mountain authorized by BLM pursuant to right-of-way grant C-33396. According to Mountaintop the purpose of the multi-user site is to provide a single communication site that would be accessible to the majority of users in order to minimize the problems associated with multiple sites such as (1) visual impacts, (2) interference, and (3) microwave path obstructions. Mountaintop stated that the multi-user site was expensive and that if new users are permitted to operate their own facility, "the economics of the multi-user site will be lost." Finally, Mountaintop stated that it has successfully operated the multi-user site for 4 years and has leased space to competitors with no conflicts.

BLM stated in its decision that because communication sites on public lands are in great demand but are difficult to manage, the Grand Junction District Office established six multi-user communication facilities in 1981. Included in these multi-user sites is the one located on Lookout Mountain owned and operated by Mountaintop. According to BLM, since 1981 the Grand Junction District Office has had a policy of not authorizing other communication sites except when the multi-user site has insufficient physical and/or electronic space or cannot solve interference problems.

BLM rejected Glenwood Mobile's communication site right-of-way because the multi-user facility has building and tower space available for use by Glenwood Mobile Radio. BLM acknowledged that Mountaintop is a competitor, but noted that Mountaintop is bound by the terms of its right-of-way grant C-33396 to rent space in accordance with a standard lease. The BLM decision stated it was made without prejudice to appellant's right to file an application to locate its equipment within the existing multi-user building on Lookout Mountain. 3/

2/ The Land Report and Decision Record in the case file discloses that right-of-way C-23456 was amended in 1984 to allow Garfield County to use a larger building on the same site and to remove the smaller structure. The report indicates the building was left at the site and sold to appellant without assignment of the right-of-way.

3/ The answer to the statement of reasons for appeal, filed on behalf of BLM, indicates appellant has moved its equipment into the multi-user building pending resolution of this appeal.

On appeal, Glenwood Mobile argues that it should be entitled to the use of a separate communication facility because (1) Mountain Bell, which is a public utility, has its own site and therefore Glenwood Mobile, which asserts it is also a public utility, should have its own site; (2) it should not be required to lease space from its competitor because appellant's equipment and customer lists would not be secure there; (3) it is economically less desirable to rent from Mountaintop than to operate a facility it owns; (4) appellant would again be in competition with Mountaintop when they install a microwave system from Grand Junction to Vail in that Mountaintop has such a system; (5) there would be no adverse visual impact because appellant's proposed site is already in existence; and (6) the request is within BLM's policy guidelines in that there are two multi-use buildings on Monument Peak and Colorado Ute was permitted to erect its own buildings.

In its answer to appellant's arguments, BLM states that Mountain Bell was granted two communication sites, one on May 11, 1966, the other on August 14, 1974. According to BLM the multi-user site was created 8 years later for smaller users like Mountaintop and Glenwood Mobile.

BLM notes that the tenants in the multi-user facilities currently secure their equipment in locked lockers, and therefore expects that Glenwood Mobile would be able to do the same.

With respect to rental costs, BLM estimates the annual rental Glenwood Mobile would be required to pay BLM for its own site is \$1,500. BLM notes that currently Mountaintop site users pay annual rental of \$250 to BLM and an additional \$85 per month to Mountaintop.

BLM states that if Glenwood Mobile's needs expand beyond the capacity of Mountaintop's facilities, appellant could submit a new application for an independent site.

With respect to the communication site rights-of-way on Monument Peak, BLM states that the grants were issued prior to establishment of the multi-user building on Monument Peak. When the other right-of-way holders seek renewal of the grants, BLM submits that it will consider requiring them to relocate into the designated multi-user building.

[1] The Secretary of the Interior is authorized by section 501(a)(5) of FLPMA to grant rights-of-way over public lands for "systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of communication." 43 U.S.C. § 1761(a)(5) (1982). Approval of rights-of-way is a matter of discretion. Dale Ludington, 94 IBLA 167, 172 (1986).

Departmental regulations at 43 CFR Subpart 2802 set out the rules regarding right-of-way applications. Under 43 CFR 2802.4 an application may be denied if the authorized officer determines that the proposed right-of-way would not be in the public interest. 43 CFR 2802.4(a)(2). A BLM decision rejecting an application for a right-of-way will ordinarily be affirmed by the Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the

public interest, and no sufficient reason is shown to disturb BLM's decision. Dale Ludington, supra at 172; High Summit Oil & Gas, Inc., 84 IBLA 359, 365-66, 92 I.D. 58, 61-62 (1985).

BLM denied the application on grounds that the Mountaintop multi-use facility was suitable for the current needs of Glenwood Mobile and that Glenwood Mobile's location of its equipment in its own separate facility was contrary to BLM's policy of fostering multi-use facilities to reduce the problems associated with management of multiple single-use facilities. We affirm BLM's decision as a rational balancing of the conflicting interests made with due regard for the public interest. We are sensitive to Glenwood Mobile's concern about leasing space from its competitor; however, absent evidence that Mountaintop discriminates against its lessee-competitors, there is no basis for overturning the BLM decision. BLM adequately addressed each of appellant's other concerns.

As BLM stated, Glenwood Mobile is not precluded from applying for independent sites in the future should the multi-site facility become unsuitable for its needs.

Accordingly, pursuant to the authority delegated to the Board of Land appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

